UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **PAUL R. SCHMERSEY**, Debtor.	Case No. **02-51838-7**
RICHARD J. SAMSON, Plaintiff. -vs- **DOROTHY M. SCHMERSEY**, Defendant.	Adv No. **03-00253**

MEMORANDUM OF DECISION

At Butte in said District this 21st day of March, 2005.

Pending in this adversary proceeding to recover property are: (1) the Defendant Dorothy M. Schmersey Trust's (hereinafter referred to as the "Trust" or "Dorothy's Trust") motion for summary judgment, filed January 27, 2005, seeking dismissal of the Plaintiff/Trustee's complaint on the grounds Plaintiff's only evidence of a "transfer" to Dorothy M. Schmersey ("Dorothy") from her son the Debtor Paul R. Schmersey ("Paul"), is inadmissible hearsay from a judgment debtor examination ("JDE") of Paul taken in a state court proceeding of which Dorothy and her

Trust had no notice or knowledge; and (2) the Plaintiff's motion[1] for a preliminary ruling on admissibility of Paul's JDE former testimony since he is unavailable to testify under FED. R. EVID. 804(b)(1), and under the catchall residual exception of FED. R. EVID. 807. A hearing on both matters was held at Missoula after due notice on March 10, 2005. Dorothy's Trust was represented by attorney Harold V. Dye ("Dye"), and the Plaintiff was represented by attorney James H. Cossitt ("Cossitt"). No testimony or exhibits were admitted into evidence. The Court heard argument from counsel, after which the Court took both matters under advisement.

The parties admit that this Court has jurisdiction in this adversary proceeding under 28 U.S.C. § 1334 and that it is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O). At issue is (1) whether Paul's former testimony is not excluded by the hearsay rule under Rule 804(b)(1) when the Defendant did not have notice of or knowledge of Paul's JDE or an opportunity to develop Paul's testimony by direct, cross or re-direct examination; (2) whether Paul's former testimony is not excluded by the hearsay rule under the residual exception, Rule 807; and (3) whether Defendant has satisfied the burden for summary judgment under Rule 56(c), FED. R. CIV. P. (applicable in adversary proceedings under F.R.B.P. 7056) of showing that there is no genuine issue as to any material fact and that Defendant is entitled to summary judgment as a matter of law. For the reasons set forth below, the Court will enter a separate Order denying Plaintiff's motion to admit Paul's JDE testimony as hearsay under Rule 802, since the Defendant did not have an opportunity and similar motive to develop Paul's testimony by direct, cross or re-direct examination as required in order to not exclude as hearsay former

[1]Plaintiff's motion was filed twice, on January 28, 2005, and January 30, 2005 (Docket Nos. 27 and 28.

testimony under Rule 804(b)(1), and the Court deems application of the residual exception of Rule 807 inappropriate. Notwithstanding that decision, Defendant's motion for summary judgment also will be denied for failure to satisfy the burden of showing that there is no genuine issue as to any material fact.

FACTS

The Debtor Paul R. Schmersey is Dorothy's son and was the defendant in Case # DV-02-220-C in the Montana Eleventh Judicial District Court, Flathead County (the "state court proceeding") in which Patch Rubber Company was the plaintiff and represented by Cossitt. By stipulation, a JDE examination of Paul was held at Cossitt's office on June 3, 2002. Paul was represented by counsel, Gregory E. Paskell, at the JDE. Nothing in Plaintiff's pleadings or the record shows that Dorothy or her Trust had knowledge or notice of Paul's JDE examination, or that they participated[2]. Cossitt examined Paul at length about his business dealings and financial affairs, much of which is not pertinent to the case at bar[3].

Beginning at page 48 through 51of Paul's JDE transcript ("JDE Tr."), Cossitt elicited testimony from Paul that his mother Dorothy advanced to Paul $320,000 to purchase a house on Iron Horse Boulevard in West Palm Beach, Florida, in his name, where she would live in Paul's care. Paul testified that the house was paid for in cash, JDE Tr. at p. 72, was sold at a loss in June or July of 2001 for $282,000, and the proceeds less a six percent (6%) commission and closing costs, about $248,000, went back to Dorothy who took the money and moved to Kansas.

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[2]The transcript of Paul's JDE examination is attached to Docket nos. 27 and 28 as Ex. 3.

[3]After discussing Paul's loss of leased vehicles, Cossitt asked: "What are you going to do for transportation?" Paul's answer was: "I'm looking for a good horse". JDE Tr., p. 27.

JDE Tr., pp. 50-52. Paskell did not cross examine Paul regarding the alleged transfer of sale proceeds to Dorothy. Later Cossitt asked Paul: "[I]s it possible, instead of going back to your mother, that some of those proceeds funded this CD[4]?", and Paul responded that it was possible. JDE Tr., p. 60.

Paul filed a Chapter 7 bankruptcy petition commencing Case No. 02-51838-7 on June 19, 2002. Richard J. Samson was appointed Chapter 7 Trustee on June 25, 2002. Cossitt, representing Patch Rubber Company, commenced Adversary Proceeding No. 02/00104 against Paul, which was resolved by stipulation for entry of Judgment entered February 18, 2003, which excepted Patch Rubber Company's claim in the amount of $275,000 from Paul's discharge. The Trustee employed Cossitt as attorney for the estate on July 14, 2003.

The complaint was filed commencing this adversary proceeding on December 17, 2003. The Complaint includes five (5) claims for relief based on state and federal law seeking avoidance of a transfer and judgment against Dorothy in the amount of approximately $266,650.33, representing the alleged transfer from Paul to Dorothy of net proceeds from the sale of the real estate in West Palm Beach, Florida, on or about July 2001. Count I sets forth a claim for relief for actual fraud based on 11 U.S.C. § 544(b) and applicable state law, Mont. Code Ann. § 31-2-333(a) and § 31-2-339. Count II asserts a claim for relief for constructive fraud under § 544(b) and Mont. Code Ann. § 31-2-333(b). Count III asserts a claim under 11 U.S.C. § 547(b) and § 550(a) to recover an insider preference. Count IV asserts a claim for actual fraud under 11 U.S.C. § 548(a)(1)(A). Count V asserts a claim for constructive fraud under § 548(a)(1)(B).

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[4]That CD apparently is a $200,000 CD in Paul's wife Judy's name at Flathead Bank, of which Paul claimed to have no knowledge. JDE Tr., pp. 67-68.

Dorothy filed a motion to dismiss, but that was withdrawn by Stipulation filed and approved by the Court on October 14, 2004, which substituted the Trust for Dorothy as party-defendant. The Trust filed an answer on October 15, 2005, stating that Dorothy is deceased, denying that a transfer of proceeds from the sale of the Florida property was made by Paul to Dorothy or the Trust, asserting an affirmative defense of the statute of limitations, and praying that Plaintiff take nothing by his complaint.

A pretrial scheduling conference has been held and trial is scheduled to commence on April 7, 2005. Discovery closes on March 18, 2005, according to the Pretrial Order entered January 13, 2005. Defendant filed the pending motion for summary judgment on January 27, 2005, together with a Statement of Uncontroverted Facts and Brief, and an affidavit of Leslie R. Monroe ("Monroe Aff."), stating he is a certified public accountant and co-trustee of the Defendant Trust who is sole administrator and sole custodian of the business and financial records of the Trust, along with attached trust documents, correspondence, and real estate closing documents.

Defendant's Statement of Uncontroverted Facts derives from Monroe's affidavit that the Trust advanced to Paul the sums of $75,000.00 and $355,000.00 in 1999, that Monroe has no record or knowledge that Paul ever repaid those advances or transferred any money or property to the Trust, Monroe Aff., second page, paragraphs 7 and 8. The advanced funds were to be used by Paul to construct a residence, and Paul agreed to provide lifetime living quarters for Dorothy[5], but that agreement was voided. Monroe Aff., pp. 2-3, paragraphs 10-12 and Ex F attached to

[5]In return for lifetime care of Dorothy, Paul would have had to repay the Trust only $100,000 upon Dorothy's death. Ex. C attached to Monroe Aff., pp. 2-3, paragraph 10.

Aff.

Ex. E attached to Monroe's affidavit is the closing statement for the sale of the Ironhorse Boulevard property in West Palm Beach, with a settlement date of July 6, 2001. Ex. E shows a net proceeds from the sale in the amount of $266,650.33. Ex. F attached to Monroe's affidavit is a handwritten letter Paul fax'd to Monroe, Ex. F, to which Monroe responded immediately on June 3, 2002, by Ex. G. Monroe Aff., p. 3, paragraph 14. In Ex. F Paul asked Monroe to document that Dorothy directed Monroe to transfer $420,000 to Paul to buy the Ironhorse Boulevard home, and that in July 2001 "Mr. Schmersey" authorized a personal loan to Paul's spouse Judy of the proceeds from the sale of that home in the amount of $266,650.30 until they get reestablished, with the amount to be carried as a loan to Judy. The Court notes that the date of Paul's handwritten fax to Monroe, June 3, 2002, is the date of Paul's JDE examination.

Monroe responded to Ex. F on the same date by Ex. G, dated June 3, 2002, reciting that Paul's brother John, with Dorothy's consent, in June of 2001 agreed to allow the net proceeds from the sale of $266,650 to be considered a loan to Paul's spouse Judy in the amount of $266,650.30. Monroe Aff., p. 3, paragraphs 14-15 and Ex G attached to Aff. But Ex. G goes on to state that Dorothy's records still reflect the advances, a total of $430,000 (not $420,000 as stated in Ex. F), as due. In paragraph 15 Monroe gives the reasons why the Trust's records carry the full obligation due as, first, Monroe never received any verification that Judy assumed liability for the $266,650.33 in proceeds received from the sale of the Ironhorse property, and Monroe was unsure of the legal consequences arising from the voiding of Paul's agreement to provide lifetime quarters for Dorothy in 2002. Monroe Aff., p. 3, paragraph 15.

Ex. I to Monroe's affidavit is a summary of assets and reflects a "life use fee" for Paul

under "Other" in the amount of $430,000 with the parenthetical "(Paul says amount owing is from Judy and in the amount of $266,650)". Monroe Aff., p. 3, paragraph 15 and Ex I attached. Paragraphs 16 and 17 of Monroe's affidavit state that the Trust's records do not show that Paul repaid any of the advances to the Trust, that Monroe has no personal knowledge that Paul repaid any of the advances or otherwise transferred any money or property to the Trust, and that Dorothy had no prior knowledge of Patch Rubber's judgment or Paul's JDE examination. Monroe Aff., p. 4, paragraphs 16, 17, 19.

Plaintiff's objection to Defendant's motion for summary judgment relies on Paul's JDE examination testimony and related state court documents as wells as Paul's letter that he currently lives in New Zealand, to establish genuine issues of material fact precluding summary judgment because, Plaintiff argues, such evidence shows the existence of a transfer to the Trust and fraudulent intent. Plaintiff's brief in opposition to Defendant's motion states that Paul's JDE transcript, coupled with subsequently-discovered assets, show multiple undisclosed transactions involving the Debtor and members of his family. Plaintiff's supplemental brief further argues that Monroe's affidavit at paragraphs 14 and 15 contain conflicting, ambiguous and inconsistent facts as to the amount of debt owed by Paul which create a genuine issue of material fact as to whether a transfer did or did not occur.[6]

DISCUSSION

[6]Paragraph 14 of Monroe's affidavit identifies Ex. F, the fax received from Paul stating the amount of the Trust's transfer to Paul as $420,000 and the sales proceeds as in the amount of $266,650.30; and Ex. G which states the total advance as $430,000 and the net proceeds as $266,650. Paragraph 15 states the amount of proceeds variably as $266,650 and $266,650.33. Plaintiff suggests these differences comprise "conflicting, ambiguous and inconsistent facts as to the amount of debt owed by Paul" which creates a genuine issue of material fact precluding summary judgment. Plaintiff's supplemental brief, Docket No. 33, pp. 7-8.

A. Contentions of the Parties.

Defendant moves for summary judgment as a matter of law on the grounds that all of Plaintiff's claims for relief require, as an essential element, proof of the existence of a transfer from Paul to the Defendant, and that since Paul's JDE testimony is inadmissible hearsay Defendant is entitled to judgment as a matter of law because of the lack of any evidence of a transfer. Defendant concedes that Paul is unavailable, but argues that Paul's JDE testimony is hearsay and not admissible as former testimony under Rule 804(b)(1) because the Defendant did not have notice or knowledge of Paul's JDE examination and thus had no opportunity and similar motive to develop Paul's testimony by direct, cross or redirect examination.

The parties, during the hearing, provided no information to the Court whether letters rogatory would be appropriate or available and would eliminate the issue over Paul's unavailability. *See* 8 Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 2083 (1994); 22 C.F.R. §§ 92.54 and 92-66; 23 Am. Jur. 2d *Depositions and Discovery*, §§ 17 and 18 (2002); and FED. R. CIV. P. 28(b).

Plaintiff opposes Defendant's motion for summary judgment on the grounds Paul's JDE testimony establishes there was a transfer to the Trust, and establishes fraudulent intent. Plaintiff argues that Paul's JDE testimony is relevant and contains assertions "that are inconsistent with subsequently discovered information"[7] involving undisclosed transactions with the Trust and family members. While arguing that Paul's JDE testimony "is inconsistent with, at odds and contradictory to other evidence in the case the trustee seeks to present and it is needed to impeach or rebut this other evidence", the Plaintiff also argues that Paul's former testimony is admissible

[7]Plaintiff's objection to motion for summary judgment, pp. 3-4 (Docket No. 30)

under Rules 804(b)(1) and 807 because Paul and the Defendant "share like – if not indistinguishable – motives to develop testimony about material facts."[8] Despite arguing Paul's testimony is inconsistent and contradictory to the Plaintiff's other evidence and is "needed to impeach or rebut this other evidence"[9], Plaintiff contends Paul's JDE testimony regarding his ownership of assets "is reliable and should be admissible"[10] under Rule 807 because it has "equivalent circumstantial guarantees of trustworthiness".

B. Hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801. Paul's JDE testimony is unquestionably hearsay, because the declarant Paul is not available to testify and the Plaintiff offers Paul's JDE testimony to prove the truth of the matters asserted with respect to the amounts of advances to Paul by the Trust to purchase the Ironhorse Boulevard property, that the proceeds were transferred to Dorothy, and to impeach and rebut Defendant's evidence that Paul transferred the proceeds instead to his spouse and the advances remain unpaid.

Rule 802, FED. R. EVID., provides that hearsay is not admissible except as provided by applicable rules. The hearsay rule and the Confrontation Clause of the Sixth Amendment to the United States Constitution serve to protect similar values, and seek, subject to limited exceptions, to preserve the opportunity for cross-examination of persons whose declarations are placed before the fact-finder and to aid the fact-finder's ability to assess the declarant's credibility by

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[8]Docket No. 30, Plaintiff's objection to motion for summary judgment, p. 4.

[9]Plaintiff's motion, Docket No. 28, p. 7.

[10]Plaintiff's motion, Docket No. 28, p. 8.

viewing that individual as the testimony is given. *State v. Bagshaw*, 137 Idaho 613, 616, 51 P.3d 427, 430 (Idaho App. 2002); *California v. Green*, 399 U.S. 149, 155, 157-58, 90 S.Ct. 1930, 1933, 1934-35, 26 L.Ed.2d 489, 495, 497 (1970); *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, 607 (1980). Paul was not cross-examined at his JDE examination on the transfer of proceeds, and Paul is unavailable for the Court to observe his demeanor as he testifies.

Recently, the Ninth Circuit in *U.S. v. Wilmore*, 381 F.3d 868, 871-72 (9th Cir. 2004), noted that the Supreme Court has rejected the Confrontation Clause test established in *Roberts*, and held that testimonial evidence against a criminal defendant cannot be introduced where the declarant was unavailable at trial and no opportunity existed for cross examination at the time the prior testimony was given. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). The Court concluded, "[w]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.*; *Wilmore*, 381 F.3d at 872. The Ninth Circuit in *Wilmore* reversed and remanded for a new trial on Sixth Amendment grounds when the defendant did not have the opportunity to confront and cross-examine a witness at a grand jury hearing, coupled with the district court's restrictions on cross examination which prohibited the defendant from probing the witness's credibility, motive and bias. *Wilmore*, 381 F.3d at 872-73. The instant case is a civil case not a criminal case and thus no Sixth Amendment constitutional question is involved, *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 608 (9th Cir. 1993), *cert. denied,* 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994), but the underlying policy to preserve the opportunity for cross-examination and to aid the fact-finder's ability to assess the declarant's

credibility remains. *Bagshaw*, 137 Idaho at 616, 51 P.3d at 430.

It is uncontroverted that Dorothy and the Trust did not have notice or knowledge of, and therefore did not have the opportunity to cross-examine Paul at the JDE examination. Neither did Paul's attorney cross-examine him on the facts of the transfer of proceeds[11]. On the other hand, a leading commentator notes that actual cross-examination is not required, but merely an opportunity to exercise the right to cross examine if desired is required. 5 Joseph P. McLaughlin, *WEINSTEIN'S FEDERAL EVIDENCE*, § 804.04[3][a] (2nd Ed. 2005).

C. Former Testimony – Rule 804(b)(1).

No dispute between the parties exists that Paul is unavailable under Rule 804(a). He is in New Zealand. Plaintiff's motion to admit Paul's JDE testimony invokes the "former testimony" hearsay exception of Rule 804(b)(1), which allows admission of a witness's testimony given at a prior hearing "if the party against whom the testimony is now offered ... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *U.S. v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002); *U.S. v. Geiger*, 263 F.3d 1034, 1038 (9th Cir. 2001).

Rule 804(b)(1) provides that in a civil action, former testimony is not excluded under the hearsay rule if the party against whom the testimony is now offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Rule 804(b)(1). Plaintiff argues that Paul's JDE testimony should be admitted under this rule because Paul is Defendant's predecessor in interest and had a similar motive to develop Paul's JDE testimony, asserting that Paul and the Defendant "share like – if not

[11]Paskell did ask Paul what he paid for the Ironhorse Boulevard property. JDE Tr. at 50.

indistinguishable – motives to develop testimony about identical material facts". In the Court's view, however, the record does not support this argument at all.

The "similar motive" requirement is inherently factual and depends at least in part on the operative facts and legal issues and on the context of the proceeding. *Geiger*, 263 F.3d at 1038; *United States v. Salerno*, 505 U.S. 317, 324-25, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992); *Battle v. Memorial Hospital at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000). Plaintiff cites *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978) as support for finding a similar motive between Paul and Defendant in the instant case. Initially the Court notes one important factual distinction between the instant case and *Lloyd*: While in the instant case the Defendant had no notice of the Paul's JDE examination, in *Lloyd* both altercants were represented by counsel and testified under oath at a prior Coast Guard hearing to determine misconduct by Lloyd. *Lloyd*, 580 F.2d at 1182. The Third Circuit Court of Appeals reversed and remanded for a new trial because of the failure of the district court to admit the Coast Guard hearing transcript, concluding that the Coast Guard was the predecessor in interest of the person injured by Lloyd (Alvarez) and had similar motive to Alvarez's motive (to recover for his injuries) by virtue of the Coast Guard's motive to vindicate the public interest in safe and unimpeded merchant marine service. *Lloyd*, 580 F.2d at 1186, 1190. The court noted the "community of interest" advanced by both Alvarez and the Coast Guard was to determine culpability and if appropriate exact a penalty for the condemned behavior. *Lloyd*, 580 F.2d at 1186.

Geiger found similar motive because of substantially similar issues in state and federal suppression hearings, and the actual testimony addressed issues pertinent to both hearings. 263

F.3d at 1038-39. Again, however, unlike the instant case Defendant Geiger was present at the prior hearing represented by counsel and cross-examined the witness. *Id.*

Plaintiff contends that Paul and the Defendant share "like – if not indistinguishable – motives to develop testimony about identical material facts", that Plaintiff's claims in this adversary proceeding required factual determinations of Paul's rights as beneficiary of the Trust which Paul's former testimony establishes, and that Plaintiff needs Paul's testimony because it is inconsistent with and contradicts other evidence which the Plaintiff seeks to present and is needed to impeach or rebut this other evidence. It is true that similar motive does not mean identical motive. *Geiger*, 263 F.3d at 1038 (quoting *Salerno*, 505 U.S. at 326, 112 S.Ct. 2503 (Blackmun, J. concurring)). However, the differences between Paul's JDE examination in state court and the instant adversary proceeding, the factual and legal issues underlying the hearings, and the content of Paul's testimony, all lead this Court to conclude that Paul is not the Defendant's predecessor in interest, and did not have a similar motive for purposes of Rule 804(b)(1). *See Geiger*, 263 F.3d at 1038-39.

Lloyd urged a realistically generous but not extravagant interpretation of what constitutes a predecessor in interest over one that is formalistically grudging, and noted the congressional intention that "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." *Lloyd*, 580 F.2d at 1187. The Fifth Circuit and Second Circuit note that the test for similar motive must turn "not only on whether the questioner is on the same side of the same issue at both proceedings, but also whether the questioner had a substantially similar interest in asserting and prevailing on the

issue." *Battle*, 228 F.3d at 552; *United States v. DiNapoli*, 8 F.3d 909, 912 (2nd Cir. 1993).

Paul's attorney did not examine him at his JDE at all about his direct testimony that the net proceeds from the sale of the Ironhorse Boulevard property went back to his mother Dorothy. Paul's JDE testimony was a proceeding conducted in aid of execution of a state court judgment against Paul. JDE Tr., p. 5. By contrast, in the instant adversary proceeding no judgment has been entered nor has liability of the Defendant been determined. The legal theories of Patch Rubber Company against Paul for which it won a judgment, through a stipulated settlement, based on state law have not been shown to be similar to the Plaintiff's claims for relief against the Trust in this adversary proceeding based upon fraudulent transfer and preference, some of which involve purely federal bankruptcy issues.

The aim of Cossitt's JDE examination of Paul was to find assets with which to satisfy Patch Rubber Company's judgment. Paul's motive, shown by his actual testimony which this Court may consider, *Geiger*, 263 F.3d at 1038-39, appears to have been to misdirect Cossitt's inquiry in aid of execution and throw him off the scent and trail by testifying that the sale proceeds went to his mother rather than his spouse. JDE Tr., pp. 51-52, 67-69. Plaintiff argues that Paul and the Defendant "share like – if not indistinguishable – motive" to develop testimony about Paul's alleged transfer. But Defendant denies that the sale proceeds went to Dorothy or the Trust at all, and so not only is Paul on the opposite side from Defendant on that factual issue, but also Paul did not share the Defendant's interest in asserting and prevailing on the issue because it would have shown he testified falsely when he said the proceeds went back to his mother. *Battle*, 228 F.3d at 552; *United States v. DiNapoli*, 8 F.3d 909, 912. Paul's motive on the issue of the disposition of sale proceeds was at cross purposes, if not directly adverse, to the motive Dorothy

or her Trust would have pursued if they had been given the opportunity to cross-examine Paul on the sale proceeds which Monroe's affidavit, and Ex. F, G, and I, assert were transferred not to Dorothy, but directly to Paul's spouse Judy. Based on the Defendant's dissimilar motive from Paul's, the Court finds that Paul is neither Defendant's predecessor in interest nor shared a similar motive with the Defendant to cross-examine himself on the alleged transfer.

Plaintiff moves for admission of Paul's JDE testimony to impeach or rebut other evidence Plaintiff seeks to present and to prove fraudulent intent. Paul's JDE testimony undoubtedly contradicts Monroe's affidavit and attached documents[12]. However, the similar-motive inquiry reflects narrow concerns of ensuring the reliability of evidence admitted at trial. *Battle*, 228 F.3d at 552, *citing Salerno*, 505 U.S. at 326, 112 S.Ct. 2503 (Blackmun, J. concurring). Plaintiff asserts, without support, that Paul's JDE testimony is reliable, but considering Paul's actual testimony at the JDE hearing and the evidence shown by Monroe's sworn affidavit and Ex F attached thereto, the Court deems admission of Paul's JDE testimony inconsistent with the concern of ensuring the reliability of evidence admitted at trial.

Paul testified under oath on June 3, 2002, that the net proceeds of the sale went back to his mother, JDE Tr., p. 51. Later, Paul testified that he had no knowledge where his spouse got her $200,000 CD, although subsequently he admitted that it is possible some of the sale proceeds funded the CD. JDE Tr., pp. 67-69. Monroe's sworn affidavit states that on the same date as the JDE examination, June 3, 2002, Paul sent Monroe Ex. F requesting that the Trust document that

[12]Plaintiff does not state whether his other evidence is the same as Monroe's or different.

"Mr. Schmersey"[13] authorized a personal loan to Paul's spouse using the $266,650.30 proceeds the previous July. Monroe Aff., p. 3, paragraphs 14-15. If Paul sent Monroe Ex. F prior to his JDE examination on June 3, 2002, then he testified falsely under oath at JDE Tr., pages 67-69, when he testified that he had no knowledge of where the $200,000 came from for his wife's CD. On the other hand if Paul sent Monroe Ex. F after to his JDE examination on June 3, 2002, then clearly Paul was attempting to cover his tracks by having the Trust documents reflect that the Trust authorized the loan the previous year[14]. Either way, the Court deems admission of Paul's JDE testimony inconsistent with the concern of ensuring the reliability of evidence admitted at trial. *Battle*, 228 F.3d at 552, *citing Salerno*, 505 U.S. at 326,

In sum, based upon the lack of notice to the Defendant and lack of opportunity to examine Paul, and lack of similar motive and similar interest to assert and prevail on the issue of where the sale proceeds went, the Court finds that Paul's former testimony is not excepted from the hearsay rule under Rule 804(b)(1), and Paul's JDE testimony is not admissible as hearsay under Rule 802.

D. Residual Exception – Rule 807.

Plaintiff also moves for admission of Paul's JDE testimony under the "residual exception" of Rule 807, arguing that Paul's testimony is reliable because it deals with his then-existing property and has circumstantial guarantees of trustworthiness. Rule 807 provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent

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[13]Ex. G suggests that Paul's brother John is the "Mr. Schmersey" identified in Ex. F as authorizing the loan, and that Dorothy consented. Monroe Aff., p. 3, paragraph 15.

[14]After covering his tracks and sending Cossitt in the wrong direction of the Trust, Paul moved to New Zealand.

> circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it . . .

See Figgie, 994 F.2d at 608.

"A court's most important inquiry under [Rule 807] is whether the proffered evidence has trustworthiness equivalent to that of the enumerated hearsay exceptions." *Id.* (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir.1991)), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994). Guarantees of trustworthiness are based upon the circumstances existing when the declarant made the statement. *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir.1979). Relevant factors include whether the declarant has personal knowledge of the matters he is asserting, whether he makes the statement voluntarily and under penalty of perjury and whether his statement can be corroborated. *See, e.g., United States v. Sinclair*, 74 F.3d 753, 760 (7th Cir.1996) (penalty of perjury); *United States v. Mokol*, 939 F.2d 436, 439-40 (7th Cir.1991) (corroboration); *United States v. Curro*, 847 F.2d 325, 327 (6th Cir.) (voluntariness), cert. denied, 488 U.S. 843, 109 S.Ct. 116, 102 L.Ed.2d 90 (1988); *United States v. Snyder*, 872 F.2d 1351, 1356 (7th Cir.1988) (penalty of perjury); *United States v. Yonkers Contracting Co.*, Inc., 701 F.Supp. 431, 437 (S.D.N.Y.1988) (personal knowledge, contemporaneity). The probability of the truthfulness of a statement is not generally relevant to its admissibility under the residual exception. *Huff*, 609 F.2d at 293. Thus, an oath by itself is insufficient to guarantee the trustworthiness of the declarant. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 167 (3rd

Cir.1995), *cert. denied*, 516 U.S. 1145, 116 S.Ct. 1015, 134 L.Ed.2d 95 (1996); *Mutelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 713 (9th Cir.1992); *United States v. Fernandez*, 892 F.2d 976, 981 (11th Cir.), *cert. denied*, 495 U.S. 944, 110 S.Ct. 2201, 109 L.Ed.2d 527 (1990).

Examining those factors, Paul's JDE testimony was made voluntarily under oath and penalty of perjury, and he testified with personal knowledge of the transfer of proceeds to his mother (but not of the source of his spouse's CD). On the other hand the Plaintiff has offered no evidence to corroborate Paul's testimony that he transferred the proceeds to his mother. Indeed, Plaintiff argues instead that Paul's testimony contradicts and impeaches his other evidence and is needed to prove fraudulent intent. *Frigge* discussed circumstantial guarantees of trustworthiness and included among them whether the declarants had a motive to lie, or whether a risk arises that the statements were "the product of faulty perception, memory or meaning, the dangers against which the hearsay rule seeks to guard". *Frigge*, 994 F.2d at 608 (quoting 4 Weinstein & Berger at 803-785). As discussed above, Paul had a clear motive to lie about the disposition of the sale proceeds at his JDE examination, *viz.*, to frustrate Patch Rubber Company's proceeding in aid of execution of its judgment and retain the $200,000 in his spouse's name. Based on the lack of identified corroboration and Paul's motive to lie, the Court finds circumstantial guarantees of trustworthiness of Paul's JDE testimony to be lacking for purposes of the residual exception.

Turning to Rule 807's listed factors, Paul's former testimony is offered as evidence of a material fact, the alleged transfer of sale proceeds to his mother[15]. Second, the Court does not find that Paul's testimony is more probative on the point for which it is offered than any other

[15]The amount of advances made to Paul in 1999 is not, as Plaintiff contends, a material fact.

evidence which the proponent can procure through reasonable efforts. Monroe's affidavit shows that he is co-trustee of the Trust and its sole administrator and custodian of the Trust's business and financial records. The Plaintiff through ordinary discovery could procure the Trust's business and financial records and depose Monroe to ascertain whether or when Paul sent the sale proceeds to his mother or Trust. The fact that the Trust's records and Monroe's affidavit directly contradict Paul's JDE testimony on the transfer of proceeds does not make his testimony more probative than the Defendant's actual trust business records, especially when the Defendant did not have notice and the opportunity to cross-examine Paul. Finally, in light of Paul's conduct on June 3, 2002, to have the Trust records document a loan of the proceeds to his spouse almost a year after the fact, and his subsequent move to New Zealand that rendered him unavailable to testify, the Court finds that the interests of justice would not be served by admission of his JDE testimony into evidence under the residual exception to the hearsay rule, Rule 807.

E. Defendant's Motion for Summary Judgment.

Defendant moves for summary judgment dismissing Plaintiff's complaint for lack of evidence of a transfer, since Paul's JDE testimony is excluded as hearsay. Plaintiff objects not only on the grounds the JDE is admissible, but also because subsequently-discovered assets (which are not specifically identified) show multiple undisclosed transactions involving the Debtor and members of his family, and that Monroe's affidavit at paragraphs 14 and 15 contain conflicting, ambiguous and inconsistent facts as to the amount of debt owed by Paul which create a genuine issue of material fact as to whether a transfer did or did not occur.

Summary judgment is governed by F.R.B.P. 7056. Rule 7056, incorporating Rule 56(c), FED. R. CIV. P., states that summary judgment "shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "The proponent of a summary judgment motion bears a heavy burden to show that there are no disputed facts warranting disposition of the case on the law without trial." *In re Younie*, 211 B.R. 367, 373 (9th Cir. BAP 1997) (*quoting In re Aquaslide "N" Dive Corp.*, 85 B.R. 545, 547 (9th Cir. BAP 1987)). Once that burden has been met, "the opponent must affirmatively show that a material issue of fact remains in dispute." *Frederick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir.1985). That is, the opponent cannot assert the "mere existence of some alleged factual dispute between the parties." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Instead, to demonstrate that a genuine factual issue exists, the objector must produce affidavits which are based on personal knowledge and the facts set forth therein must be admissible in evidence. *Aquaslide*, 85 B.R. at 547.

The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement Corp. v. Fischback & Moore, Inc.*, 793 F.2d 1100, 1103-04 (9th Cir. 1986), *cert. denied*, 469 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Electrical Service*, 809 F.2d at 630 (citing *Liberty Lobby*, 477 U.S. at

248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *Id.*; *Liberty Lobby*, 106 S.Ct. at 2510.

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. *T.W. Electrical Service*, 809 F.2d at 630; *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 202 (1986). Thus, the Court's ultimate inquiry is to determine whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *T.W. Electrical Service*, 809 F.2d at 631.

Applying the above standards for summary judgment, the Court first notes that the differences between Monroe's affidavit at paragraphs 14 and 15 in the amounts of the advances made in 1999 are not material. Even though Paul's JDE testimony, which is not admitted, is that the amount of the advances was $320,000 while Monroe's affidavit and Ex. G state the total is $430,000, the amount of advances in 1999 is not relevant to an element of a claim or defense, and the amount of advances, of which there is no admissible evidence any was repaid to the Trust, cannot affect the outcome of this adversary proceeding. Similarly, the differences in Monroe's affidavit of the amount of sale proceeds amount to pennies, which the Court considers *de minimis* and not material.

Next, Plaintiff argues that Monroe's affidavit and John Schmersey's deposition (which was not submitted with Plaintiff's objection or anywhere on the case docket), and Paul's JDE examination, show that the transfer of proceeds may have been a sham transaction on paper but

nonetheless a transfer. Monroe's affidavit at paragraphs 14 through 17, and Ex. E, F, G and I attached thereto, show that none of the 1999 advances were repaid by Paul and remain due, but that John and Dorothy consented in June 2001 to allow the net proceeds to be considered as a loan to Paul's spouse Judy, although co-trustee Monroe was unaware of that consent for almost a year and has never received verification that Judy assumed liability for the $266,650.33 loan.

A "transfer" is broadly defined by the Code, 11 U.S.C. § 101(54), as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *In re Mora,* 199 F.3d 1024, 1026-27 (9th Cir. 1999).

Because of the broad definition of "transfer" in the Code, and because of the Plaintiff's heavy burden as moving party to show that there are no disputed facts warranting trial, *Younie*, 211 B.R. at 373, this Court denies Defendant's motion for summary judgment because the Defendant failed to show no genuine issue of material fact regarding the existence of a transfer from the Trust, as initial transferee under 11 U.S.C. § 550, of the net sale proceeds based upon the loan authorized by John and Dorothy shown by Monroe's affidavit, paragraphs 14 and 15, and Ex. F and G. This Court makes no finding or opinion herein of the Plaintiff's likelihood of success on proving the existence of a transfer by the Defendant Trust, where the co-trustee and sole administrator and custodian of the Trust Monroe was unaware of the existence of the loan[16]

[16]Several unanswered questions remain on whether such a loan was authorized or ratified by the Trust based solely upon John's and Dorothy's consent, and without written agreement with Judy evidencing the loan, under the governing Trust documents. But those questions are left for trial.

until almost a year after the fact and has never received verification from Judy that she assumed liability for the $266,650.33. Simply for purposes of the instant motion, the Court finds that Monroe's affidavit, paragraphs 14 and 15 and Ex. F and G create a genuine issue of material fact as to the existence of a transfer under the broad definition of that term under § 101(54) sufficient to defeat Defendant's motion for summary judgment.

CONCLUSIONS OF LAW

1. This Court has jurisdiction in this adversary proceeding under 28 U.S.C. § 1334.

2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O).

3. Paul's former testimony from his JDE examination is not admissible under the hearsay exception under Rule 804(b)(1) as former testimony when the Defendant did not have notice of or knowledge of Paul's JDE examination or an opportunity or similar motive to develop Paul's testimony by direct, cross or re-direct examination.

4. Paul's former testimony is not admissible under the residual hearsay exception under Rule 807 because of the lack of circumstantial guarantees of trustworthiness, Paul's motive to lie, and lack of corroboration.

5. Defendant failed to satisfy its heavy burden for summary judgment under Rule 56(c), FED. R. CIV. P., of showing that no genuine issue exists as to any material fact and that Defendant is entitled to summary judgment as a matter of law, based upon the broad definition of "transfer" under 11 U.S.C. § 101(54) and Defendant's evidence that Paul's mother and brother consented to a loan of sale proceeds to Paul's spouse.

IT IS ORDERED a separate Order shall be entered in conformity with the above denying Defendant's motion for summary judgment, filed January 27, 2005; and denying

Plaintiff's motion, filed January 30, 2005, to admit prior testimony of the Debtor Paul R. Schmersey in this adversary proceeding.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana